

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVE ALAN STRICKLAND,

Defendant-Appellant.

UNPUBLISHED

January 28, 2000

No. 209765

Kent Circuit Court

LC No. 97-001467-FC

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by jury of criminal sexual conduct, first degree, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and criminal sexual conduct, second degree, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced as a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, to concurrent prison terms of fifteen to forty years for the first-degree conviction and ten to twenty years for the second-degree conviction. Defendant appeals as of right. We affirm.

Defendant first argues on appeal that there was insufficient evidence of penetration to sustain his conviction of first-degree criminal sexual conduct. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

In the present case, defendant argues that the only evidence of penetration came when the prosecution introduced the victim's preliminary examination testimony, and that this evidence should not have been admitted. We find this argument without merit. In reviewing claims of legally insufficient evidence, this Court examines all the evidence, regardless of whether it was properly admitted. See *Lockhart v Nelson*, 488 US 33, 40-42; 109 S Ct 285; 102 L Ed 2d 265 (1988). Regardless, putting aside the evidence that defendant now finds objectionable, we find the remaining evidence sufficient to support defendant's first-degree criminal sexual conduct conviction. The evidence revealed that the victim had named only defendant as the person who assaulted her. The eight-year-old victim testified

that defendant had rubbed her “private parts” with his “private part” and his hand, and indicated that on one occasion, defendant hurt her private part. Further, a doctor testified that he examined the victim and found decreased hymenal tissue and a scar on the back wall of her vagina. The doctor concluded that the victim’s vagina had been penetrated by blunt force more than fourteen days before the examination. Viewing this evidence in a light most favorable to the prosecution, we conclude that sufficient evidence exists from which a rational trier of fact could find that penetration occurred, and thus sufficient evidence supports defendant’s conviction of first-degree criminal sexual conduct.

In the same argument, defendant raises a claim that the prosecutor engaged in misconduct in both her opening statement and closing arguments. Defendant’s focus on the alleged misstatements and improper argument of the prosecutor do not reach the issue of the sufficiency of the evidence, but rather prosecutorial misconduct. However, defendant did not object at trial to either of the matters of which he now complains. Unpreserved claims of prosecutorial misconduct are precluded from review unless failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We have viewed the matters complained of and conclude that no miscarriage of justice would occur from declining to review these unpreserved claims.

Defendant next argues that the trial court erred in concluding that the prosecutor did not exercise a peremptory challenge in a race- and gender-motivated fashion. Specifically, defendant contends that the trial court violated defendant’s constitutional right of equal protection when permitting the prosecutor to remove the sole remaining black juror on the panel on grounds of race and gender. We disagree. In a criminal trial, a prosecutor’s use of peremptory challenges is governed by the equal protection clause of the United States Constitution. *Batson v Kennedy*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986). “To overcome a claim of discriminatory purpose, the prosecution must provide a racially neutral explanation for peremptorily excluding racial minorities from the venire, and the trial court must decide if the defendant proved purposeful discrimination.” *People v Ho*, 231 Mich App 178, 184; 585 NW2d 357 (1998); *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). We review a trial court’s determination of whether a defendant proved purposeful discrimination for an abuse of discretion. *Ho, supra* at 184; *Howard, supra* at 534.

In the present case, the prosecutor exercised a peremptory challenge to remove a black woman from the venire, to which defendant objected. When explaining her reasons for the removal, the prosecutor noted that the case was going to involve a “black woman mother, inner city,” who had her children removed from the home. She said that she intended to treat the victim’s mother as at least partly responsible for the assault on the victim. Because the victim’s mother had been a victim of domestic violence, as had the juror, the prosecutor believed that the juror might be offended by the treatment the prosecutor intended to give the victim’s mother. In addition, the juror had a relative who had been convicted of a crime in Kent County. In overruling the race challenge, the trial court indicated that it viewed the prosecutor’s reason as focusing on the fact that both the juror and the victim’s mother were victims of domestic violence, and that the juror had a relative who had been involved with the prosecutor’s office. It further noted that two other venirepersons who also had relatives who had been prosecuted were struck at the same time. On this record, it is apparent that there was a clear and

articulated racially neutral basis for exempting the juror, and defendant did not prove purposeful discrimination. Thus, we find no abuse of discretion.

To the extent that defendant argues that the reason was related to gender, which is prohibited under *J E B v Alabama ex rel T B*, 511 US 127, 144-145; 114 S Ct 1419; 128 L Ed 2d 89 (1994), we disagree. It is not clear that defendant ever objected on the grounds of gender or that the court's response related to gender. Regardless, we find no abuse of discretion in the court's ruling. From the court's findings, it is clear that the court heard the reasons given as focusing on the juror's and the victim's mother's status as persons who had suffered acts of domestic violence, as well as the juror's status as the relative of a person who had been prosecuted in Kent County. No abuse of discretion is shown.

Defendant also contends that the trial court abused its discretion in not removing a juror who, he claims, showed bias. We disagree. “[W]hen information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause.” *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998). Lack of actual bias or prejudice is a matter for the trial judge's determination. *People v Johnson*, 103 Mich App 825, 830; 303 NW2d 908 (1981), overruled in part on other grounds *Daoust, supra*.

In the present case, defendant argues that the juror's bias is “unmistakable.” Here, a juror expressed concern about the way in which the victim's testimony was presented. After excusing the other jurors, the court met in chambers with counsel and the juror, who told the court that she wondered if the victim could have had an easier time expressing what she was trying to say by using a doll. The court then asked the juror if she was saying that she could not continue as a juror or that she just believed it would have been a better way of handling the testimony. The juror responded that she believed it would be a better way of handling the testimony. From this exchange, there is no reason to believe that the juror was somehow prejudiced, particularly against defendant. The juror's comments and opinion did not reveal a bias or prejudice that would influence how she would decide the case, and therefore, her statements would not form the basis for a challenge for cause. *Daoust, supra*. Thus, there is no basis to exclude the juror.¹ We find no error.

Next, defendant argues that the trial court erred in remanding the case to the district court to take additional evidence to determine whether defendant should be charged with first-degree criminal sexual conduct, in violation of his due process rights. A court has the power to remand a case on motion of the prosecutor to the district court for a new preliminary examination. *People v Kennedy*, 384 Mich 339, 344; 183 NW2d 297 (1971); *People v Miklovich*, 375 Mich 536, 539; 134 NW2d 720 (1965). “[S]ubjecting a defendant to repeated preliminary examinations violates due process if the prosecutor attempts to harass the defendant or engage in ‘judge-shopping.’” *People v Robbins*, 223 Mich App 355, 363; 566 NW2d 49 (1997). When determining whether a due process violation has occurred, factors to consider include the reinstatement of charges without additional, noncumulative evidence not introduced at the first preliminary examination, the reinstatement of charges to harass, and judge-shopping to obtain a favorable ruling. *People v Vargo*, 139 Mich App 573, 578; 362 NW2d 840 (1984).

Initially, after the preliminary examination involving only testimony from the victim, the magistrate concluded that there was sufficient evidence to charge defendant with second-degree criminal sexual conduct. However, the magistrate also told the prosecutor that if he could produce additional evidence, the court would consider whether to charge defendant with first-degree criminal sexual conduct. Within the time allowed by the court, a return was filed, vesting jurisdiction in circuit court. See *People v Goecke*, 457 Mich 442, 458-459; 579 NW2d 868 (1998). The prosecutor moved to remand the case to district court so the magistrate could take additional evidence. Over defendant's objection, the court granted this motion. At the second hearing, the prosecutor introduced testimony from a doctor regarding his examination of the victim and his conclusions. At the end of the hearing, defendant was bound over on first-degree criminal sexual conduct charges. We find no due process violation here. Once jurisdiction was vested in the circuit court, it had the power to remand as "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." MCL 600.611; MSA 27A.611.² Moreover, none of the *Vargo* factors are present here. We find no error.

Defendant also argues that, under MCL 766.4; MSA 28.922 and MCR 6.110, an "egregious delay" precluded the magistrate from conducting the second preliminary examination. However, defendant's remedy was to move to dismiss the case before the second preliminary examination. *People v Crawford*, 429 Mich 151, 157; 414 NW2d 360 (1987). If he received an adverse ruling, he could, before trial, file an application for leave to appeal to this Court, and if this Court denied leave, file an application with the Supreme Court. *Id.* Defendant may not now raise this issue.

Defendant next contends that the trial court made a number of errors in evidentiary rulings.³ We find no errors requiring reversal. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

First, defendant argues that the victim's preliminary examination testimony should not have been admitted. At trial, the court allowed a Grand Rapids police officer, who was present at the preliminary examination, to read from the preliminary examination transcript that the victim had said that defendant did something to her while she was sleeping, and that defendant's hands went "in my private part." Then, when asked if "in my private part" meant penetration, the officer responded affirmatively.

Out-of-court statements offered for their truth are usually inadmissible hearsay. MRE 801(c); MRE 802. However, MRE 801(d)(1)(A) provides that inconsistent testimony from a prior hearing is admissible if the declarant is available for cross-examination and the out-of-court statement was given under oath. Inconsistency is not limited to diametrically opposed answers, but may be found in evasive answers, inability to recall, silence, or changes of position. *People v Chavies*, 234 Mich App 274, 282; 593 NW2d 655 (1999). The victim's testimony in this case was vague on direct examination as to whether penetration had occurred. On cross-examination, however, defense counsel elicited an admission that the victim did not say at the preliminary examination that she had been penetrated. The prosecution limited its use of the preliminary examination to the precise portions of the record referenced by defense counsel. The statement made by the victim at her preliminary examination that defendant had put his fingers "in my private part," was inconsistent with her statement at trial that she had not testified as to penetration. We find no abuse of discretion in admitting this testimony.

Defendant also complains of the follow-up question to the police officer and her answer concluding that “in my private part” meant penetration, arguing that the officer’s conclusion was improper testimony as to an ultimate issue of fact. Defendant did not object to this evidence; defendant has forfeited this claim of error. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We conclude that declining to review this issue would not result in manifest injustice.

Defendant further complains a portion of caseworker Joel Stelt’s testimony was improperly admitted. Before such testimony, defendant had offered the testimony of Debra Strickland, who testified that she had caught the victim putting the nozzle of a plastic dish soap bottle “inside of her.” She also denied ever meeting with Stelt and telling him that she had seen defendant pulling the victim’s panties down. In rebuttal, Stelt testified that his notes reflected that Strickland was present at the meetings the family had with him, and that she had told Stelt that she had seen defendant pulling down the victim’s panties. Defense counsel objected and the court gave an instruction to the jury limiting its consideration of the evidence to Strickland’s credibility and expressly prohibiting it from using the evidence as substantive evidence that defendant had committed the offense reported in Stelt’s notes.

“The prosecution is entitled to cross-examine defense witnesses and introduce rebuttal testimony.” *People v McRunels*, 237 Mich App 168, 183; ___ NW2d ___ (1999). Whether to admit or exclude evidence at trial is within the court’s discretion. *Id.* Upon review of the record, we conclude that the trial court did not abuse its discretion in allowing admission of Stelt’s rebuttal testimony. The evidence was relevant to the credibility of a defense witness, and upon its admission, the trial court immediately instructed the jury on the limited use of that evidence.⁴ We find no error.

Finally, defendant complains of the admission of evidence through three different witnesses that the victim had accused defendant of committing the offenses, and that she had not accused anyone else. Prior consistent statements are admissible to rebut an express or implied claim of recent fabrication if made before the motive to fabricate arose. *People v Rodriquez (On Remand)*, 216 Mich App 329, 331-332; 549 NW2d 359 (1996). In addition, prior statements of identification may be admitted as substantive nonhearsay evidence. *People v Sykes*, 229 Mich App 254, 266-267; 582 NW2d 197 (1998); MRE 801(d)(1)(C). In this case, defendant argues that there was nothing to show that the consistent statements were made before the motive to fabricate arose. Admittedly, we find nothing in the record to show when the motive to fabricate could have arisen. However, the evidence that the victim had not accused others is more akin to identification testimony than to a prior consistent statement. To the extent that the absence of any other identification could be considered a statement, it would appear to fit under the identification provision of MRE 801(d)(1)(C). Regardless, even if the admission was error, it was harmless, as the record did not show that it was more probable than not that such contributed to the verdict, see *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999), where the victim herself identified defendant in court as the person who committed the offenses. In sum, we see no abuse of discretion in admitting this evidence.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

¹ To the extent that defendant argues that he would be entitled to relief if he could have exercised a peremptory challenge had he known about the juror's concerns earlier, his argument is without merit. This is not a portion of the current test for showing a right to a new trial for juror misconduct; it was rejected in *Daoust, supra*, 7-9.

² We acknowledge that *People v Stafford*, 168 Mich App 247, 254; 423 NW2d 634 (1988), aff'd 434 Mich 125 (1988), held in part that a circuit court may remand only on a finding that the evidence was insufficient to support the charge on which the defendant was bound over. However, we are not bound by *Stafford*, which was issued before November 1, 1990. MCR 7.215(H)(1). In affirming *Stafford*, our Supreme Court did not reach the issue of under what circumstances a court could remand a case to the district court. In addition, *Goecke, supra*, articulates the current state of the law.

³ To the extent that defendant again argues the unpreserved issue of prosecutorial misconduct here, we have already determined above that no miscarriage of justice would occur from declining to review this claim.

⁴ Although defendant suggests that the rebuttal testimony violated MRE 802, MRE 404(b), and MRE 403, his argument focuses on "the prosecutor's misconduct in introducing this evidence." We find this argument without merit. As we have stated, whether such evidence is admissible is within the discretion of the trial court and, because that the evidence was relevant to a witness' credibility and the court gave a proper limiting instruction, we find no abuse of discretion.